Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

BERMAN J. WATTS, JR.
Petitioner,

vs.

JOHN O.MARSH JR., Secretary of the Army; DEPARTMENT OF THE ARMY, Headquarters United States Army Aviation Center and Ft. Rucker,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner Pro Se

QUESTIONS PRESENTED

I. WHETHER THE DECISIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS AND THE MIDDLE DISTRICT SOUTHERN DIVISION FEDERAL COURT OF ALABAMA CONFLICT WITH THE DECISIONS OF THIS COURT WITH REGARD TO THE APPLICATION,TIMELINESS,JURSIDICTION, AND EQUITABLE TOLLING OF TITLE VII, MIXED CASE MSPB JUDICIAL AND APPELLATE JUDICIAL REVIEW INITIATION AND FILING.

LIST OF PARTIES

United States District Court
Judges

Myron Thompson

Truman M. Hobbs Jr.

Robert Varner.

Lt. Gen. Ellis D. Parker,
formerly Commander Ft. Rucker
subsequently Dir. Army Staff.
COL. Donald J. Marnon,then
Garrison Commander subsequently
retired.

Merit Systems Protection Board.
MSPB Office of the Special
Counsel*.
EEOC,EEOCORA.

United States Army Civilian Appellate Review Agency.
M. Cunningham, Administrative Law Judge
David M. Smith, Cheif U.S. Army Litigation Civilian Employment Branch, formerly Labor Counselor at Ft. Rucker
Amy Frisk
David Allred, Asst. U.S. Attorney
John Eldron Wilson, U.S. Attorney Montgomery, AL
Blaine King, present Labor Counselor at Ft. Rucker.
F.H. Mayer, then Director of the Directorate of Combat Developments at Ft. Rucker since retired.
C.H. Jacobus; Former Manager LHX Division of The Directorate of Combat Developments subsequently retired.

C.M. Waldran, Manager LHX Division , Directorate of Combat Developments
C.F. Auman, EEO Officer,Ft.Rucker
J.B. Truss, MP
Charles Blakely, Supervisor,ORSA DCD
Ronald D. Pfeiffer, a Supervisor in DCD Ft. Rucker.
Ralph C. Fico, Aero Engineer DCD
R. Steele, Aero Engineer Aircraft Development and Test subsequently resigned and employed by Bell Helicopter Textron.
LTC. Sheehy Supervisor, Aircraft

Development and Test Activity
R. W[illegible], President Army Aviation Board

Employees and Staff

Directorate of Combat Developments
Directorate of Engineering and Housing
Army Aviation Center
Ft. Rucker, Alabama

Army Aviation Center
Ft. Rucker, Alabama

Bell Helicopter Textron; bidder on LHX(Commanche) and subsequent employer of C.H. Jacobus as analyst

Individuals and/or Entities having access to suggestions made by Appellant and subsequently receiving award or implementing suggestion.

Decision Making/Investigative Agencies Involved.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Berman J. Watts, Jr. respectfully requests that a Writ of Certiorari issue to review the judgement

and opinion of the Eleventh Circuit entered in the above entitled proceeding on March 3, 1990.

OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported. A copy of that opinion is set forth in the appendix hereto beginning at page A-1.

The orders of the United States District Court for the Middle District of Alabama (Thompson, D.J.)is not reported. Copies of such orders are set forth in the appendix hereto beginning at page A-8.

JURISDICTION

Jurisdiction of the district court was invoked as follows:

1.pursuant to Title 28, U.S.C.§1331 and §1346 arising under the Fourteenth Amendment to the Consitution of the United States;

,2.pursuant to the provisions of Title 28, U.S.C. §1343, this being an action to redress deprivation of rights secured by Title 42, U.S.C.§ 1983;

,3.pursuant to Title 42 U.S.C Sec. 2000e. *et seq.* and 42 U.S.C. §1988, as a suit in equity , authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 U.S.C. ,*et seq.*, providing for injunctive and other relief against race discrimination.

The Middle District Southern DIvision Federal Court of Alabama was where such federal jurisdiction was invoked.

On appeal,invoking Title 28 §§1291,1292 jurisdiction the Eleventh Circuit affirmed the lower court order

of June 11, 1991 on March 3, 1993 denying MSPB Petition for Mixed case EEOC review as untimely ignoring the other issues that required such finality of remanded administrative processing to become final for appeal. Such District Court's order erroneously lists April 24,1991 rather than March 24,1991 as the date that petition for judicial review was filed. Petition for Rehearing was accepted as timely filed but subsequently denied on July 9, 1993.

The jurisdiction of this court to review the lower court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Supreme Court Rule 10 (a) provides that a Writ of Certiorari may be granted:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter....or has so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

13A-11-8 (a)1a provides that:

Harrassment-A person commits the crime of harrassment if, with intent to harass, alarm or annoy another person he

a. Strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact; or

b.Directs Abusive or obscene language or makes an obscene gesture towards another person.

c. Harrassment is a class C misdemeanor.

(It should be noted that AL has a seperate assault and battery statute whose consequnet sentences actvate the limitfor a jury trial.)

STATEMENT OF THE CASE

Summary

This case arises out of the District Court's (Middle District- Southern Division at Montgomery , Alabama) denial of a Peition for Review of an MSPB MIxed

Case (EEOC) appeal as untimely by the district court after such petition was made to the district court within 10 days of notice that judicial review of such order was not to the Appeals Court. This case further arises out of the District Court's initial judgement of June 20,1988 that appeal from was dismissed on the grounds of a lack of finality and with specific instruction that such issue would become final and appealble upon completion of the administrative processing ordered on remand by the district court.

Introduction

Ft. Rucker sprawls across a major portion of southeast Alabama and is unquestiobaly the single greatest economic engine and employer in the area. National taxes are siphoned through such

post in the billions to support the otherwise moribund surrounding economies. Lack of sufficient economic alternatives is generated by such communities culture and tradition that subordinates merit, result and productivity to hierarchy, caste and race. Distributing the merit system jobs as a "natural resource" on such basis of caste race and political fiefdoms cannot overcome the lack of certain specialized skills yet even in such civil service hiring and advancement the racial caste system is imposed upon those imported temporarily to perform tasks the locals cannot perform or train their own for.

General Wiiliam Tecumseh Sherman given a choice of pursuing a confederate army into Alabama that he had until then pursued relentlessly from

Chattanooga to Atlanta instead chose to cut a sixty mile swath through Georgia to Savannah. He recognized that the economic heartland of the South did not lie in Alabama but in Georgia and that by despoiling that heart he could hasten the fall of the Confederacy. Even then the emphasis of Alabaman's on a social distribution of the production of some to others based on hierarchy and caste had minimized it's economic development compared to Georgia and in terms of it's own military potential. Indeed Gen. Hood's attempt to draw Sherman's Army into Alabama was pointedly declined forcing him to attack General Thomas who,with a considerable contingent of black troops annihilated Hood's Army in the most decisive battle of the Civil War even though (Hood's Army) was supported by a virtually untouched

Alabama (and the remnant's of Mississippi). Thus having made the ultimate appeal to civil war to a preserve an independence necessary to a racial caste based distribution of reward according to hiearchy in preference to the Constitution and the Union such inhabitants broke and ran before their former slaves. After the war ,using deceit backed by force such whites virtually reinstalled a similar caste system under the "black codes" denying constitutional rights and so repressive as to reduce the black proportion of the population from roughly 50% at the time of the civil war to less than 32 % subsequently. Massive effort went into preventing the productive effort of blacks rather than maximizing the productive effort of all as a politcal system based on black suppression became

the path to power forcountless demagogues.

Thus when a temporary Army Camp was created during World War II in southeast Alabama named for a confederate COL. Rucker, a prosperity that the region had never experienced was created. Subsequently the Camp was brought to life as the Army's main helicopter pilot training facility and aviation center. However given the disparity generated by jobs paying better than what was traditionally available and the resultant political influence developed, it is doubtful that such base would fairly be assessed or even forced to abide within the law by forum's so dependent upon such employer.Thus the area's racial policies and plantation style of management resulted in the *Matthews Hunttington* (litigated in

another (southern) district)) consent decree with regards to Ft. Rucker which expired just prior to the complaint subject events.

It is also possible that the need for such facility is utterly without foundation and has been fraudulently maintained at a cost that includes considerable human life and reduces the efficiency of this nation's fighting forces. Given such practice the blatant violation of employment discrimination law and due process are hardly things such management would avoid.

Attack helicopters are multi-million dollar devices that crowd performance limits and that thereby require, a few thousand dollars an hour or so to operate, extensive support and pilot,operator/maintainer training. Their most important mission is now as

mobile tank killers. Using missiles such as TOW and Hellfire such a helicopter can fly well behind enemy lines, peek over a hill and fire missiles that smash tanks. But such an aircraft must remain stationary to launch it's missles. With a TOW the pilot actually guides the missile to target by an optical fiber that reels out behind the missile. Hellfire requires that a laser dot be maintained on the target for the missile to home in on. In either case the expensive helicopter and it's expensively trained pilot is a sitting duck. While a so called "fire and forget" sensor was considered for such missiles the Army abandoned it as too expensive. Yet the Airforce developed such a sensor for it's air to air Sidewinder missile in the 1950's.

A hundred miles or so east of Ft.

Rucker near Moultrie, GA is Maule Aircraft, a manufacturer who specializes in light aircraft that can take off in extremely limited distances (150 yards or so). Given the relative ease of training light aircraft pilots compared to helicopter training, far more pilots are existent and could be trained for flying such aircraft rather than helicopters in identical time frames. Given the combination of cheap, easily maintained short take off aircraft, a fire and forget antitank missile, an immense trained pilot base and an even larger potential one the cost effectiveness of such a system greatly exceeds the present never fully tested system that is dependent upon hideously expensive helicopters. It is highly unlikely that such facts escaped respondent. Thus respondent is perfectly

willing to maintain expensive, cumbersome and vulnerable systems even when more efficient and effective alternatives are available. Given such moral turpitude responent's contempt for due process and employment discrimination law could be considered minor blemishes, after all they are willing to compromise the effectiveness of their nation's defense at a cost measured in their comrades and subordinates lives.

It should also be noted that Hunttington who was involved in the original Employment discrimination suit against respondent recently died of natural causes. However the respondent's resources are vast and capable of causing physical harm by apparently natural means (for example forcing work under conditions of heat stress after determining one was taking medicine that

elevated blood
pressure, or exposing one to hazardous chemical contaminated landfill vent areas,etc).. Petitioner had several near accidents that were successfully avoided as to serious injury including one in which a gasoline tanker was suddenly backed across half the main road in Daleville forcing a swerving stop to the other side of the street and resulting in letters to the Chief of Police and To the regional Civil Rights Commission. Such event occurred just prior to depositions.

It should also be noted that the accidental death rate for blacks in Coffee county (Enterprise is the dominant city therein.), the main bedroom community of Ft. Rucker is a multiple of the white rate.(AL. Vital Events for 1986) Nor should the presence

of an armed Man primed with a false story of petitioner'prior violence , with deliberatedly limited witnesses be ignored. Only by assuring that others remained in the potential line of fire and approaching the unarmed contingent of such party could petitioner most reasonably assure his safety. Yet petioner's mere open palmed contact was prosecuted as striking not under any assault statute but under a statute that makes any unconsented to contact or speech specified not chargeable as assault, a misdemeanor based on others opinion of one's intent to harras annoy or alarm.

Indeed, even such charge was not made until a order to make false charges of assault stick was obtained from the Commanding General based on an utterly fradulent claims of "prior" violence,

disrespect for authority and and theft. At such time the Commanding General was well aware that petitioner had filed complaint with the Inspector General's office concerning discriminatory treatment as regards suggestion evaluation.

Blacks in such area do not harrass , alarm or annoy those who control armed (.45 Auto) men at their backs when they have been deliberatedly isolated in a remote area as repeated shootings of unarmed blacks in such area testify. - What they do is act to preserve their lives despite the predominance of deliberately hostile lethally armed "witnesses." In addition such deliberatedly limited witnesses have repeatedly contradicted themselves under oath, Moreover , no such charge was made until additional discrimination complaint

of the firing was made. Upon MSPB appeal the dropping of prosecution was proffered in exchange for a retroactive resignation based on event's prior to the claimed striking that the MSPB later ordered reinstatement on.(The penalty of dismissal being unprecedented for the accusations made). Moreover, conviction based on the testimony of such witnesses as to my unstated intent was in the Middle District Federal Court with Judge Varner presiding. A fine of some $250.00 along with probation was imposed equal to the time taken to pay the fine with any employer of petitioner and work status being constantly reported to the probation authorities and a stated claim by the judge that prison would be imposed if the fine were not paid).

Under Al 13-11-8 Harrassment any

contact short of assault is made a misdemeanor if the intent is to harrass , annoy or alarm. Therefore the court's finding was that a black with a gunman (MP) at his back would seek to alarm, harras or annoy those who controlled such gunman yet ignore the presence and intent of a man with the hitherto unprecedented threat of lethal force. Such finding would even have justified petitioner's being shot, which is not an unheard of event for blacks in such circumstances and location. (Alabama's Vital events for 1986 candidly iumps "plegal intervention" with Homicide as a leading cause of death among young black men in Alabama)

Moreover it was the testimony of such witnesses as to what plaintiff was thinking not what plaintiff stated was his intent that such court accepted as

fact. Yet, stating it was fully informed of such charges, and after such conviction , the Agency charged with investigation of those holding security clearances after what it stated was "a through review" restored the security clearance that had been locally withdrawn based on the local accusations and subsequently the harrassment charges.

1. *Pattern of escalating employment discrimination..*

During petioner's employment with respondent from May 1982 to July 1987 an escalating series of accusations occured in support of respodent's maintenance of a GS-09 level via local promotions for blacks. Although beginning with standard contrived accusations involving performance that even the

Army's internal investigative branch found false and unsupportable respondent's actions grew in sophistication and scope (therafter ignoring attacks on performance) until employment was terminated in a contrived incident on August 25,1986. Despite reinstatement by the MSPB upon MSPB and EEOC complaint and appeal, respondent again fired petitioner as soon as he was reinstated. First,however, criminal accusation was made as soon as respondent was notified of administrative complaint and challenge and offer to withdraw such charges for a "voluntary" retroactive resignation was made.

2. *The remaining facts integral to this petition are best presented as a portion of the argument for the granting of the writ and are included therein infra to avoid repitition of the summation of this section and the factual portions integral to the argument.*

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE ISSUED

Supreme Court Rule 10.1 provides that a writ of certiorari may be granted:

(a)when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;...or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a.. federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The instant Petition describes a blatant violation of this standard that appears to be a deliberate and sustained action to deny substantive due process.

Departure from this Court's precedent.

The decision of the Eleventh Circuit Court of Appeals departs from this

court's decision in *Irwin v. Veteran's Administration*, 874 F.2d 1092 (5th Cir. 1989), *aff'd*, 111 S.Ct. 453.(1990)

That decision held that equitable tolling is applicable to statutes of limitation in lawsuits brought against the United States. *Id at 457.*

Irwin Facts and Holdings.

Shirley W. Irwin , an employee of the Veteran's Administration Medical Center in Waco, Texas, was discharged from his position on April 17,1986. He contacted an agency equal employment (EEO) counselor on June 12, 1986 - twenty five days after his termination from federal employment. He alleged inter alia, that he was fired unlawfully on the basis of his race. The VA rejected his claim as untimely.*Irwin*,874 F.2d at 1093. Irwin appealed the VA's rejection

of his claim to the Equal Employment Opportunity Commission. (EEOC) The Commission confirmed the VA's action and notified both Irwin and his attorney of the decision by mail.

On March 27, 1987 , the EEOC's decision arrived at the Office of Irwin's attorney. The attorney however was in South Korea with his United States Army Reserve unit. *Id.* Accordingly an employee signed a receipt for the decision. Irwin later claimed awareness of the decision on April 7,1987 whereas his attorney claimed to have received it on April 10,1987.Irwin filed suit in the United States District Court for the Western District of Texas on May 6,1987 - twenty-nine days after he claimed to have received the EEOC's decision on his appeal , but forty days after it was received in his attorney's office.*Id.*

The district court determined that it lacked jurisdiction over Irwin's Title VII suit because it was untimely filed. The district court reasoned that the arrival of the EEOC decision in the Attorney's office triggered the thirty day filing period rather than Irwin's actual receipt of such decision.

The Fifth Circuit Court of Appeals affirmed the district court's opinion. *Id. at 1097.* It determined that the district court properly applied the "constructive notice" doctrine to the attorney's receipt of the EEOC's decision. It further held that the thirty day period within which to file a lawsuit is a condition of the waiver of Sovereign immunity contained in Title VII. *Id at 1093.* Thus such filing period was held to be a jurisdictional bar to untimely suits *Id.*

In affirming such circuits decision upon granting of certiorari, the Supreme court affirmed the Fifth Circuit's decision but rejected in it's entirety the jurisdictional rationale relied upon by the court of appeals. The Supreme court adopted "a... general rule to govern the applicability of equitable tolling in suits against the government. *Id at 457.* This Court held,

"A waiver of sovereign immunity cannot be implied but must be unequivocally expressed" Once Congress has made such a waiver , we think that making the rule of equitable tolling applicable to suits against the Government , in the same way that it is applicable to private suits , amounts to little if any , broadening of the congressional waiver. Such a principle is likely to be to be a realistic assessment of legislative intent as well as a practically useful principle of interpetation . We therefor hold that the same rebuttable presumption of equitable tolling applicable to suits against the United States. Congress may of course provide otherwise if it wishes to do so."

Based on precedent, this Court described two circumstances in which equitable tolling can revive an otherwise untimely lawsuit.

"We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary 's misconduct into allowing the filing deadline to pass."

Facts of the present case.

In this case petitioner was discharged on August 29,1986 and filed additional complaint of such fact on Aug 29,1986 and immediately prior to such date on August 14, 1986 on the support for such charges. Moreover it is freely admitted by respondent that an armed man sought to prevent plaintiff from talking to an EEO counselor at the personnel office on August 25,1986 after a dismissal letter

delivery. After three months with no action by the EEO petitioner timely filed a Merit Systems Protection Board (MSPB) appeal of his dismissal on December 29,1986.Immediately respondent by counsel sent an information to the correct address charging petitioner with Harassment Ala 13A-11-8 based on the initial dismissal letter delivery meeting on August 25,1986. Respondent subsequently offered *in writing* withdrawal of such criminal accusation and prosecution in exchange for "voluntary" resignation and consequent dropping of MSPB appeal and EEO complaint.

MSPB appeal resulted in an order for reinstatement as the charges made were unprecedented for a dismissal. Prosecution ensued. Based on the testimony of respondent's witnesses as to

petitioner's intent to harass annoy or alarm as demonstrated by the "provocative" utterance "justice" and by the testimony of a clenched fist visible as he drove off later, Watts was convicted of "striking" LTC Jacobus. Such striking was by placing his open hand on Jacobus' back in an effort to gain his attention as to his signalling to the armed (45 Auto) man at Watts' back. Such misdemeanor conviction was in the The Middle District Southern Division Of Alabama with The Honorable Robert Varner presiding, in March 1987.

Respondent again fired plaintiff this time adding such conviction as a basis.Suit was timely initiated in the Middle District of Alabama by plaintiff's counsel. Upon trial with the Honorable Myron Thompson presiding, a finding of no discrimination or retaliation was

made in the judgment of June 20,1988.Basis for such decision was the Secretary's articulation of a legitimate non-discriminatory/retaliratory reason for discharge with a specific statement thus avoiding any finding of the establishment of a prima facie case of discrimination Although,defendant effectively admitted the existence of such prima-facie case in it's answer and response to complaint.

However the court also remanded the case to the MSPB for further processing since the MSPB had relied upon the conviction for harassment as proof of striking whereas under such state statute mere speech if considered abusive or touch may be sufficient for conviction.

Petitioner timely appealed the decision with regards to no

discrimination and retaliation. However the Appeals court held that such appeal was premature as the remand for "for further administrative processing" had resulted in the decision lacking the finality necessary for appeal. Moreover no certification by the District Court for appeal had been made.

Subsequently, the District court issued an order citing the Appeals court decision and placing it's order , judgment and decree in full force and effect. Inquiry as to such order's conferral of finality for purposes of appeal lead to a negative response.

Meanwhile the matter of the striking (used as the articulation of cause justifying otherwise discriminatory /retaliratory acts) remained on remand with no hearing taking place until

December 9, 1988. In such hearing Defendant's counsel cited the ultimately purely jurisdictional result of Eleventh Circuit appeal as if it was on petitioner's claims on the merits. Indeed the EEOC's decision dated March 22,1990 on page 4 in citing the MSPB resultant order states,
"
"The discrimination issue is now before the Eleventh Circuit."

Despite rampart contradiction of prior testimony and the physically possible the administrative law judge managed to sustain the articulation of pretext necessary to what the Secretary's counsel presented as the Eleventh Circuit's purview in a February 9,1989 decision - that petitioner had struck and shouted at LTC Jacobus. Petitioner made further timely petition for review by the full board of the MSPB

which declined to review the Administrative law judges decision on October 2,1989. Timely petition to the EEOC under the mixed case provisions of 5 CFR § 1291.165 (d), (d)(2) was then made.

The EEOC's decision not to review the matter is dated March 22,1990.However, such letter was sent to the wrong address despite the EEOC having the correct address.

Late Notice of EEOC Decision.

Petitioner submitted evidence that he did not receive notice of the March 22,1990 EEOC decision on petition for review of MSPB remand decision appeal until after 10/1/90 as the cross out of the second notice date on the certified letter envelope containing the decision establishes and as the September 26,1990

letter from the EEOC corroborates (R-1-44 and R-2-49 appendix contents). A request for decision was made because of a reference (too short to function as notice of the six page decision) to such decision in another related EEOC matter (that the EEOC sent to the correct address) seen in a letter received less than 30 days prior. (It has been held that receipt of a copy of the decision is necessary to constitute notice.) The EEOC letter of September 26, 1990 indicates that the EEOC originally sent the notice to a New York address despite a requested correction of such address.The correct address was known as demonstrated by an EEOC letter correctly addressed prior to the letter sent to the wrong address demonstrates. (Appendix to R-1-44 and R-2-49).

The date from which an action is taken is measured from when notice is received by the complainant.

"When federal employee seeks judicial review of a decision of the Board, she or he has 30 days from personal receipt of notice to do so... *Brown v. National Highway Traffic Safety Administration,* 673 F.2d 544, 218 U.S. App . D.C. 153 (1982)

Filing of judicial review request timely.

Petitioner filed, within thirty days of receipt of notice, for judicial review of the prior district court decision and the subsequent ordered administrative processing with the clerk of the district court via the form of a Notice of Appeal to the Eleventh Circuit that must be filed with the clerk of the district court appealed from. Moreover notice of such filing was made to respondents, the form of the judicial

review requested was dictated by the forum addressed, and specific exception with regards to time upon filing in the wrong forum is provided for in the subject statute in addition to precedent within the Eleventh Circuit.The Eleventh circuit found that a pro se federal employee's Title VII complaint of discrimination and retaliation equitably tolled because the District of Columbia district court had misled plaintiff; *Washington v. Ball* 890 F.2d 413 (11th Cir. 1989).

In thus filing petitioner was relying upon the highest judicial authority then involved- the appellate court decision on the initial appeal of July 26,1988 (No. 88-7511) which stated;

" The appeal is DISMISSED for lack of jurisdiction. **The district court order remanding the action to the Merit Systems Protection Board is not appealable because it did not end the litigation on**

the merits , and did not contain a Fed .R. Civ. P 54(b) certification . *See Pitney Bowes, Inc. v. Mestre,* 701 F.2d 1365, 1368 (11th Cir. 1984) *cert. denied,* 464 U.S. 893 (1983);*William v. Bishop,* 732 F.2d 885 (11th Cir. 1984). **When a final judgment is entered by the district court, appeal from that judgment will bring up for review all preceding non-final orders. *Jones v. Preuit & Mauldin,* 851 F.2d 1322 (11th Cir. 1988).**" *Emphasis added.*

After such decision the district court issued a further order on August 1,1989 stating:

"Upon consideration of the opinion of the United States Court of Appeals for the Eleventh Circuit, dated July 26,1989, dismissing the appeal in this cause; and upon receipt on July 27, 1989 of the mandate of the United States Court of Appeals for the Eleventh Circuit issued in this cause on July 26,1989 it is the

ORDER, JUDGMENT, and DECREE of the court that the judgment of this court made and entered herein on June 20,1988, be and is in all respects placed in full force and effect."

Yet no Fed. R. Civ. P. R. 54(b) certification is evident nor in the opinion of local lawyers and law schools any ground created for a subsequent

appeal pending finality of the prior order by completion of the processing ordered on remand. Subsequently the Eleventh Circuit dismissed such appeal No. 90-7754 (and request for review) for lack of jurisdiction on March 18,1991 holding:

" This Appeal is DISMISSED for lack of jurisdiction. The notice of appeal was untimely from the last substantive order entered by the district court in this matter on August 1,1989. Fed. R. App. P. 4(a)(1). Moreover, the appellant did not seek timely review of the decision of the Equal Employment Opportunity Commission in the district court, and the district court has not entered any order reviewing that decision. *See* 42 U.S.C. § 2000e-16(c); *Lee v. United States Postl Service*, 774 F.2d 1067, 1068-69 (11th Cir. 1985) *(per curiam)*."

Such decision significantly ignores prior appeal NO. 88-7511 and the fact that such appeal's dismissal was based on a lack of finality due to the fact that such district court judgment and order for remand did not end the litigation on

the merits and thus lacked the finality necessary to appellate jurisdiction. Thus citation of the August 1989 order as the last substantive order is meaningless unless the language of such order is so Delphic as to grant finality without the awareness of attorney's consulted let alone a laymen acting pro-se. Under such circumstances and if such language was Delphic enough to convey a meaning that could have been stated in the same clear language as that of the appeals court with regards to finality and appeal, then petitioner was deliberately mislead. Such action is under both Eleventh circuit precedent and *Irwin supra*. cause for equitable tolling.

The dismissal of Appeal no. 90-7754 also ignores the fact that it was a timely sought review of administrative processing ordered on the remand made by

the district court in it's June, 1988 judgment and order. Petitioner submitted evidence that he did not receive notice of the March 22,1990 EEOC decision on petition for review of MSPB remand decision appeal until after 10/1/90 as the cross out of the second notice date on the certified letter envelope containing the decision establishes and as the September 26,1990 letter from the EEOC corroborates (R-1-44 and R-2-49 appendix contents). A request for decision was made because of a reference (too short to function as notice of the six page decision) to such decision in another related EEOC matter (that the EEOC sent to the correct address) seen in a letter received less than 30 days prior. (It has been held that receipt of a copy of the decision is necessary to constitute notice.) The EEOC letter of

September 26, 1990 indicates that the EEOC originally sent the notice to a New York address despite a requested correction of such address.The correct address was known as demonstrated by an EEOC letter correctly addressed prior to the letter sent to the wrong address and a letter from petitioner directing change to the correct dress months prior to the March 22,1990 EEOC letter (Appendix to R-1-44 and R-2-49).

The factual claim of Appeal No. 90-7754 that review was not timely sought of the Equal Opportunity Commission 's decision in the district court contradicts the prior decision in Appeal No. 88-7511 which is predicated on a review of the district court review of the MSPB and EEOC decisions underlying the June 1988, district court judgment. The March 2,

1990 EEOC letter specifically concluded (page 6) that:

"...the Commission concludes that it does not have the authority to review petitioner's allegations of discrimination based on race and reprisal with respect to his review and , accordingly , the Commission denies consideration of his petition for review."

Moreover, such decision cited *res judicata* due to the June 20, 1988 district court decision as one of the reasons for denying consideration of petitioner's claims. Such a position is a direct contradiction of the Appeals court decision No. 88-7511 that the district court decision was not final for purposes of appeal due to a remand of the "striking" issue. Clearly involved issues of discrimination and reprisal were initially reviewed in the district court order and judgment denied review by the dismissal of appeal

No.88-7511.

The notice of appeal thus filed on October 10,1990 specifically cites the same issues as those addressed in the June 20,1988 judgment, the 88-7511 appeal and those integral to the administrative processing ordered on remand.

District Court order denying petition for review erroneously advances the date of such petition's filing by an entire month so that an apparent response of four days is increased to 35 days.

The dismissal of appeal No. 90 - 7754, that first from an appellate or equal level as the 88-7511 decision informs petitioner that filing for review in the district court rather than in the Appeals court is necessary, is stamped March 18.1991. While the ***docket sheet list plaintiff's petition for review of the MSPB appeal as March***

24,1991 the order of the district court of June 11, 1991, dismissing such petition as untimely ***erroneously cites the date of the submission of such petition as being April 24,1991***. Petitioner filed objection to such order and subsequently timely filed notice of appeal to the Eleventh Circuit Court of Appeals from the last order denying review of the now completed administrative processing on remand and the initial judgment per the 88-7511 appeal decision. The eleventh circuit simply affirmed the lower court orders and judgment On March 3, 1993 on appeal decision No. 91-7860. Petition for rehearing was denied on July 9,1993.

The requirements for equitable tolling under Irwin Supra. are met.

Thus it can be readily determined

that petitioner has actively pursued his judicial remedies and at worst has filed a defective pleading during the statutory period in the face of contradictory and confusing authorities. In addition respondent's actions aggregate continuing and extensive misconduct designed to induce any exploitable error including missed deadlines. Both defective pleading and respondent misconduct are causes under *Irwin supra. for* equitable tolling.

Respondent Misconduct.

Such misconduct includes misrepresentation's made to the Eleventh Circuit in Respondent' s (Appellee's) brief of case No. 88-7511 and in subsequent filings. Respondent so freely interprets citation and omits relevant portions of holdings so as to misstate

and even invert meaning and the holdings relied upon for it's argument. Such event occurs repeatedly as cited in Petitioner's reply brief to the Eleventh Circuit. In addition to ignoring the admission of a prima facie case at R1-22-11 item 8), no less than eight instances of respondent's citation misstatement ranging form omission to pure invention are cited in pages 8 to 13 of petitioner's reply brief to such submission. The Eleventh Circuit's ruling avoided any consideration of such "professionalism" by avoiding review on jurisdictional grounds of a lack of finality necessary to appeal. On subsequent appeal , respondent claimed that any subsequent appeal on all initial judgment issues was blocked because no timely notice of appeal was made on the order giving "full force and effect" to

such judgment. But the district court's order made upon the eleventh circuit's decision was that the initial judgment was not appealable because it did not end the litigation on the merits due to it's remand of the "striking" issue for further administrative processing. The appearance of impropriety inherent in an action that so shields such misconduct from any analysis cannot but diminish the perception of the court as a an impartial arbiter of justice.

This however is not respondent's only visible misconduct in such regard. In violation of the Privacy act, Respondent with specific legal department approval released EEOC investigative and personnel files to a private attorney who had submitted a so called Freedom of Information Act Request. Such action was completed during employment and while

petitioner was involved with appeal of a prior employment discrimination case within the same district but involving another local employer.

Moreover additional misconduct is evident in the treatment afforded some of the thirty or so suggestions and proposal's made during petitioner's employment. Although a percentage based reward of savings is promised for origination of useful suggestion, all of plaintiff's suggestions were turned down as unworkable. Yet subsequently, the Director of the Directorate of Combat Developments claimed certain such suggestion was secret and removed it from incentive awards and shortly thereafter received cash award for his "own" suggestion. One identical such suggestion on disabling rotorcraft appeared as a patent by an Alexandria, VA firm. Another

suggestion on inhibiting internal combustion engines by chemical aerosols was admitted as being worked on by the former (retired) inspector general of respondent in a Wall St. Journal Article Nonlethal Arms, col 1, page 1 of Jan. 04, 1993. It was after communication by such individual's office, as inspector general that referred problems with evaluation of suggestion brought to his attention to the Commanding General at Ft. Rucker that such General evidently penciled in a notation on a memorandum concerning petitioner to make a charge of assault stick if at all possible.Only after the date of such memorandum were the charges used as the basis of petitioner's second discharge (the first being rescinded by the MSPB), Harassment AL 13A-11-8, initiated. Despite the security clearance suspension thus

inflicted by the Director of DCD based on prior charges and such conviction reinstatement of such clearance was made by external reviewing authority specifically citing knowledge of such accusations after the date of conviction.

Respondent's eager embrace of misconduct that furthers it's ends in such matters is undeniable. Thus cause for equitable tolling by the standards established by this court in *Irwin supra.*is enhanced. Yet the Eleventh Circuit ignores such argument to compound the continued lack of any review for the entire cause.

Effect of ignored precedent conceals misconduct to deny due process and Congressional intent, and gives the appearance of a lack of objectivity.

If a court of appeals may thus ignore this Court's precedent, thus concealing rampart misconduct on the part

of Respondent's counsel this Court faces an open rebellion solely to enable respondent and counsel to engage in actions destructive of substantive due process and congressional intent as expressed in Title VII and 5 U.S.C. §§§ 7701,7702,7703. Moreover, such misconduct extends to violation of law by the very entity charge with enforcing such law and aids in perpetuating a racial caste base distribution of productive result that has crippled the economic base of the involved state and poisons the effectiveness of national resources channeled through such otherwise economically moribund state region in the name of defense.

But a deadlier result is apparent. Where government attorney's may freely falsify citation and precedent and have the courts persistently (if supposedly

unintentionally) avoid not only sanction but even analysis by denying review based upon a series of ever negative decisions not only the appearance but even any alleged fact of justice is impossible. It is not sufficient that respondent has all the vast resources of the government at it's service. Deceit also must be called and it is not to be assessed by the judiciary. Nor is the question of what occurs outside the courtroom with such power to be questioned despite open violation of law and "conviction" based upon incident where witnesses were deliberately limited, the threat of lethal force was justified by deceit and petitioner is accused of striking one of three of an armed party with an armed man (45 Auto) at his back in a region where one of the leading causes of death among young black

men is homicide and the candidly included cause "legal intervention". Alabama's. Vital Events for 1986.pp 181.

The proceedings in these affairs represent a cover-up of a tiny portion of a persistent and enduring evil of racial suppression based upon force backed by deceit masquerading as the rule of law. Indicating such affairs are; "accidental death rates" for nonwhites that are multiples of the white rate in FT. Rucker's bedroom community of Coffee county; Higher premature death rate and turnover among blacks in positions beyond the glass ceiling as maintained by local promotions at the GS-09 level; Premature death, health problems and turnover among blacks involved in discrimination or retaliation complaint and; the fact respondent at Ft. Rucker is undoubtedly the single greatest area economic engine

of an otherwise moribund economy making civil service positions a natural resource to be distributed based on a racial caste system.

Such a state region's people most revere an assumed prosperity that existed when it operated on a race and caste based distribution of reward rather than production and result. Therefore, massive deconstructive effort directed towards the minimization of the enterprise and income of certain portions of the population so as to maintain a distribution of reward based on race and caste rather than merit continues. Massive effort towards diversion and destruction of productive effort is so costly that the area has never reached the point of producing more than it consumes. Thus vast military posts provide a means of transferring national

income to such area. But going into an area that substitutes reward based on caste reward based on effective innovation and production - the billions thus transferred would be better spent in an area that has a history of enterprise and growth as measured by a diversified and resilient growing economy. Only by such means can investment be allocated in such a way as to maximize the growth and resilience of the national economy in an increasingly competitive world. Why should the Nation subsidize an outmoded and destructive racial caste system that has repeatedly subverted new law within a few decades of it's inception? Why in violation of it's own canons and the interests of the nation it purports to serve should a judiciary shield such deliberate and enthusiastic destruction and waste? How can an

employer so dominant in so poor an area not exert so pervasive an effect upon all who dwell (or orignate in the case of the court of appeals) therein so as to not bias any judicial decisions involving respondent? Perhaps such answer accounts for the fact that the successful discrimination suits against Ft. Rucker have been brought in districts other than the Middle District Southern Division of Alabama.

CONCLUSION

Based on the foregoing discussion of law and fact, it is respectfully submitted that the decisions denying the petition for review of the remanded further processing and the Appellate decision denying appeal of issues that

an earlier appeals court decision had p
stated would become final and appealable
upon completion of remanded
administrative processing.

Berman J. Watts Jr.
Petitioner Pro Se

P.O. Box 82123
Atlanta, GA 30354

October 7, 1993

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7860
Non-Argument Calender

D.C. Dockett No. 87-T-804-S

BERMAN J. WATTS, JR.

Plaintiff- Appellant,

versus

MICHAEL STONE,
Secretary of the Army;
DEPARTMENT OF THE
ARMY, Headquarters United
States Army Aviation
Center and Ft. Rucker,

Defendants- Appellees.

Appeal from the United States District
Court for the Middle District Of
Alabama

(March 1,1993)

Before KRAVITCH and ANDERSON, Circuit
Judges, and JOHNSON, Senior Circuit Judge

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7860

BERMAN J. WATTS, JR.

Plaintiff- Appellant,

versus

MICHAEL STONE..,
Secretary of the Army;

Defendants- Appellees.

On
Appeal from the United States District Court for the Middle District Of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

Before : KRAVITCH and ANDERSON; Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s of rehearing En Banc are DENIED.

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ENTERED FOR THE COURT:

/s/ Phyllis Kravitch Dated 07/09/1993

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7754

BERMAN J. WATTS, JR.

Plaintiff- Appellant,

versus

JOHN O. MARSH,JR.,
Secretary of the Army;

Defendants- Appellees.

Appeal from the United States District Court for the Middle District Of Alabama

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Before : KRAVITCH, EDMONSON and DUBINA; Circuit Judges.

BY THE COURT

This appeal is DISMISSED for lack of jurisdiction. The notice of appeal was untimely from the last substantive order entered by the district court in this matter on August 1,1989. Fed. R. App. P.

4(a)(1). Moreover, the appellant ddi not seek timely review of the decsion of the Equal Employment Opprtunity Commission in the district court, and the district court has not entered any order reviewing that decision. *See* 42 U.S.C. § 2000e-16(c); *Lee v. United States Postal Service*,774 F.2d 1067, 1068-69 (11th Cir. 1985) (per curiam).

.....
.....

Dated filed March 20, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-7511

BERMAN J. WATTS, JR.

Plaintiff- Appellant,

versus

JOHN O. MARSH, JR.,
Secretary of the Army;

Defendants- Appellees.

Appeal from the United States District Court for the Middle District Of Alabama

---

Before : VANCE,HATCHETT and CLARK;
Circuit Judges.

BY THE COURT

The appeal is DISMISSED for lack of Jurisdiction . The district court order remanding the action to the Merit Systems Protection Board is not appealable because it did not end the litigation on the merits, and did not contain a Fed R.

Civ. P. 54(b) certification . *See Pitney Bowes, Inc. v. Mestre,* 701 F.2d 1365, 1368 (11th Circuit.) *cert. denied,*464 U.S. 893 (1983); *Williams v. Bishop,* 732 F.2d 885 (11th Cir. 1984). When afinal judgement is entered by the district court, appealfrom that judgement will bring up for review all preceding non-final orders. *Jones v. Preuit & Mauldin,* 851 F.2d 1322 (11th Cir. 1988).

Dated filed 07/26/1989.

AB

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE
DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.)

Plaintiff)

vs.)

JOHN O. MARSH, JR.,) CIVIL ACTION NO.
in his capacity as) 87-T-804-S
Secretary of the)
Army

Defendant)

ORDER

On April 24,1991, plaintiff Berman J. Watts , Jr. filed a petition for review in this court. On May 10,1991, the defendant filed a responseto the petition. By order entered on May 21,1991, the court treated the defendant's response as a motion to dismiss and set the motion for submission on June 7, 1991. This cause is , therefore, now beforethe court on the defendant's motion to dismiss. The court having considered the motion and the plaintiff's response to the motion, the court is of the opinion that the plaintiff's petition for review is untimely. Accordingly, it is the ORDER, Judgment, and Decree of the court:

(1) That the defendant's motion to dismiss be and it is hereby granted; and

(2) That the plaintiff's petition for review be and is hereby dismissed.

DONE, this the 11th day of June 1991.

/s/Myron Thompson
UNITED STATES DISTRICT JUDGE.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE
DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.)

Plaintiff)

vs.)

JOHN O. MARSH, JR.,) CIVIL ACTION NO.
in his capacity as) 87-T-804-S
Secretary of the)
Army

Defendant)

JUDGMENT

In accordance with the memorandum opinion entered this date , it is the ORDER, JUDGMENT, and DECREE of the court that judgement be and is hereby entered in favor of defendant John O. Marsh, Jr. and Against plaintiff Berman J. Watts, as to plaintiff Watt's claims of discriminatory and retaliratory discharge brought pursuant to 42 U.S.C. A. §§ 2000e through 2000e-17.

It is the further Order, Judgement, and DECREE of the court that this cause be and it is hereby remanded to the Merit Systems Protection Board for further appropriate proceedings, as to plaintiff Watts's appeal of the decision that he was discharge for wrongful conduct, brought pursuant to 5 U.S.C. A. §§ 7702, 7703.

It is further Ordered that each party bear its own costs.

DONE, this the 20th day of June, 1988.

Myron Thompson
UNITED STATES DISTRICT JUDGE